SYED JALALUDDIN SYED AHAMED MALIK A

v.

FOO SUN ENTERPRISE & OTHER APPEALS

HIGH COURT MALAYA, KUALA LUMPUR B
HADHARIAH SYED ISMAIL JC
[CIVIL APPEAL NOS: R3-12B-1551-2009,
R3-12B-1552-2009 & R3-12B-1553-2009]
2 SEPTEMBER 2010

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CIVIL PROCEDURE: *Adjournment - Refusal - Appeal against decision of Sessions Court disallowing application for adjournment - Discretion of trial judge to grant adjournment - Whether unfettered - Whether trial judge exercised discretion correctly*

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CIVIL PROCEDURE: *Change of solicitors - Whether 'new' solicitor had conduct of the matter without the filing of a notice of change of solicitors - Right to select own solicitor - Whether appellants were given right to be represented by counsel of their own choice*

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CONSTITUTIONAL LAW: *Fundamental liberties - Right to counsel - Refusal to grant adjournment and dismissal of claim - Whether appellants were denied right to be heard - Whether there was denial of legal representation - Whether judge erred in her decision*

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Each of the three appellants had earlier filed a negligence suit against the same respondent for reckless driving in causing a collision between their vehicles and a motor lorry driven by the respondent's deceased agent. The trial proceeded with the testimony of only one investigating officer ('SP1') where the court adjourned the matter to several dates in November 2009 for continued hearing. On the day of the second hearing, the appellants wrote to the court seeking an adjournment on the ground that they no longer wished to be represented by Messrs Rahim & Co ('current solicitor') and wanted to appoint Messrs Raj & Co ('new solicitor'). The court granted the adjournment on an understanding that the case will proceed as scheduled. However, in the subsequent hearing, the appellants again sought another adjournment as the current solicitor refused to allow the new solicitor to take over conduct. The Sessions Court refused to grant an adjournment and dismissed the appellants' claim without hearing the merits of their case. The appellants appealed against the judgment and were heard together.

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Held (allowing the appeals):

(1) Four days were insufficient to enable the appellants to appoint a new solicitor as the current solicitor refused to allow the new solicitor to take over conduct of the matters. The appellants were not looking for a solicitor as they had clearly indicated and unreservedly appointed the new solicitor to represent them. However, the notice of change of solicitors could not be filed due to the current solicitor's refusal. The appellants' inability to effect the change of solicitors was a genuine predicament that constituted sufficient grounds to grant an adjournment. (para 9)

(2) The trial judge seemed to have overlooked the merits of the appellants' case. These were negligence suits where liability and damages had to be determined and assessed by the court. The court would not be able to say that the appellants did not have a meritorious case from the pleadings itself. Thus, it was incorrect for the trial judge to say that the appellants had failed to prove their claim when she refused to give them a chance to prove their claim. (para 11)

(3) A grave injustice had been caused to the appellants with the refusal of an adjournment, denying them the right to be represented by counsel of their own choice and, of utmost important, the right to be heard. (para 12)

Case(s) referred to:

Dick v. Piller [1943] 1 All ER 627 ***(refd)***

Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1 CA ***(refd)***

Hong Leong Assurance Bhd v. American Home Assurance Company, Malaysia [2008] 1 LNS 141 HC ***(refd)***

Hup San Timber Trading Co Sdn Bhd v. Tan Ah Lan [1978] 1 LNS 66 FC ***(refd)***

Jaya Harapan Development (PJ) Sdn Bhd v. Koperasi Kasuma (M) Bhd & Anor [2008] 1 LNS 389 HC ***(refd)***

Lee Ah Tee v. Ong Tiow Pheng & Ors [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 FC ***(refd)***

Mohanlal Gordhandas Sheth v. Ban Guan & Co [1955] 1 LNS 74 HC ***(refd)***

Uniutama Management Holdings Sdn Bhd v. Mata IT Services Sdn Bhd [2009] 1 LNS 1583 HC ***(refd)***

For the appellants - Harjit Singh (En Raj with him); M/s Raj & Co A
For the respondent - Dato' RK Nathan; M/s Vinod Kamalanathan & Assocs

Reported by Melanie Murthy

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JUDGMENT

Hadhariah Syed Ismail JC:

Introduction

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[1] These three appeals were heard together as it involved the same parties and subject matter. The appeals are against the judgment of the Sessions Court in refusing to grant an adjournment and dismissing the appellants' claim without hearing the merits of their case. I allowed all the appeals with no order D as to costs and instruct for the cases to be reverted back to the Sessions Court for continued hearing. The respondent appealed against my decision.

Background Facts

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[2] Each of the appellant/plaintiff has filed a negligence suit against the same respondent/defendant for reckless driving in causing a collision between their respective vehicles and a motor lorry No. MV 6602 driven by the respondent's agent or person authorized by the respondent. A total of nine vehicles were F involved in the collision and 16 police reports were lodged. The driver of the motor lorry died on the spot. Particulars of negligence has been pleaded in the statement of claim. The appellants claim against the respondent damages for personal injuries and damage suffered by them as a result of the said G collision. All the appellants were represented by En Abdul Rahim, a solicitor from a firm of solicitors Messrs Abdul Rahim & Co.

[3] The case was fixed for hearing on 6 October 2009. The trial proceeded with only an investigating officer (SP1) was called to H testify. Upon the conclusion of SP1's testimony, the court adjourned the case to 5 November 2009, 9 November 2009 and 24 November 2009 for continued hearing. However, on 5 November 2009, without the knowledge of their solicitor, the appellants wrote to the court seeking for an adjournment on I 5 November 2009 on the ground they no longer want En Abdul

A Rahim to represent them. They want to appoint Mr Raj of Messrs Raj & Co as their new solicitor. The court granted the adjournment on 5 November 2009 to enable the appellants to appoint the new solicitor with an understanding that the case will proceed on 9 November 2009. But on 9 November 2009, the
B appellants again asked for another adjournment as the new solicitor could not he appointed as yet. The reason being En Abdul Rahim, the previous solicitor refused to allow the new solicitor to take over conduct of the matters as Messrs Abdul Rahim had spent RM37,000 on each of the appellant. This is despite the
C new solicitor's undertaking to protect their lien for the costs. In the alternative, the appellants ask the court to allow them to withdraw the case with a liberty to file afresh. Respondent's solicitor objected to an adjournment. On the withdrawal of the suit, both the respondent and En Abdul Rahim objected to it.
D Needless to say, the trial judge refused adjournment on the ground the cases are listed as priority cases and adjournment will affect the number of cases fixed for hearing on that day. The appellants were instructed to conduct the cases on their own. But the appellants were not ready. Based on the evidence of the
E investigating officer, the trial judge dismissed the appellants claim on the ground the appellants failed to prove their claim.

In her grounds of judgment, the trial judge states:

F > Berdasarkan keterangan Pegawai Penyiasat (SP1), Plaintif-Plaintif telah gagal membuktikan tuntutan mereka. Mahkamah telah mendengar keterangan saksi pertama pada 6.10.09 dan berdasarkan keterangan pegawai penyiasat (SP1) Plaintif-Plaintif telah gagal membuktikan tuntutan mereka, Mahkamah memutuskan untuk menolak tuntutan Plaintif dengan kos.

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Grounds Of Appeal

[4] As set out in the memorandum of appeal, the grounds of appeal can be summarized as follows:

H 1. That court did not consider intention of plaintiffs to change solicitors.

2. That court failed to consider plaintiffs' request for an adjournment on the ground that plaintiffs wanted to change
I solicitors.

3. That court failed to allow plaintiffs to withdraw the action with liberty.

4. That withdrawal of the case and to re-file is the right of the plaintiffs.

5. Court was wrong in either failing to adjourn or to give liberty to withdraw and then dismissing the case.

6. Court was wrong to fail to note that plaintiffs had not closed their case.

7. Court failed to consider that former solicitors Abdul Rahim & Co refused to allow the new solicitors to take over.

8. Court refused to appreciate that the new solicitors could not take over the case without the consent of the former solicitors.

Principles On Adjournment

[5] To grant or refuse an application for adjournment is a discretionary power of a judge. It is a discretion that need to be exercised judiciously with due regard to accepted principles of law. These principles are set out in the Federal Court case of *Lee Ah Tee v. Ong Tiow Pheng & Ors* [1984] 1 CLJ 26; [1984] 1 CLJ (Rep) 187 and they are as follows:

1. Whether or not a party should be granted an adjournment is wholly at the discretion of the judge. He would exercise the discretion solely upon his view of the facts.

2. *Prima facie* this discretion is unfettered.

3. The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.

4. Although an appellate court has power to interfere with the judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.

A 5. An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power
B and indeed a duty to review the exercise of the discretion.

[6] This subject of application for adjournment was dealt with in depth by the Court of Appeal in *Dick v. Piller* [1943] 1 All ER 627 and agreed to and adopted by the Federal Court in *Lee Ah*
C *Tee*'s case. Below is the observations made by the Federal Court with regard to *Dick v. Piller*'s case.

> *Dick v. Piller* reviewed a number of authorities on the exercise of the discretion and amongst the cases cited was *Maxwell v. Keun & Ors* [1928] 1 KB 645. In that case, Atkin LJ set out some
D important guidelines in his judgment appearing at pages 653 and 657 respectively. It is useful to repeat them and they are as follows:
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> > if it appears that the result, of the order made below is to
> E defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice ... such an order, and it is, to my mind, its duty to do so.
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> > In the exercise or a proper judicial discretion no judge ought to make such an order as would defeat the rights of
> F a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion.

Maxwell v. Keun & Ors was cited with approval in a local Court
G of Appeal case, *Mohanlal Gordhandas Sheth v. Ban Guan & Co* [1955] 1 LNS 74.

In *Hup San Timber Trading Co. Sdn Bhd v. Tan Ah Lan* [1978] 1 LNS 66, Wan Sulaiman FJ (as His Lordship then was) observed:

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> On occasion of doubt such as the present one, the guiding principle should be that both party should be given an opportunity to be heard. Any delay occasioned by what appears to be an inadequate reason for absence can be compensated by an award of appropriate costs.

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Appellants' Submission

[7] Before me, learned counsel for the appellants submits the trial judge had erred in her approach. She should have allowed the appellants' request for withdrawal of the case with liberty to file afresh and subject to costs. In the interest of justice these appeals should be allowed because merits of the case was not heard.

Respondent's Submission

[8] In urging this court to dismiss these appeals, the respondent contend that the court did give adjournment to allow the appellants to change solicitors. It was the appellants who did not comply. To allow further adjournment would set a dangerous precedent as everyone wanting a last minute adjournment would use this case as a precedent. After all the present trend of the courts is to proceed to conclude the case without any unnecessary adjournments. In addition, case law favours the dismissal for want of compliance with court's directions. Reference was made to the following cases:

1. *Jaya Harapan Development (PJ) Sdn Bhd v. Koperasi Kasuma (M) Bhd & Anor* [2008] 1 LNS 389.
2. *Hong Leong Assurance Bhd v. American Home Assurance Company Malaysia* [2008] 1 LNS 141.
3. *Uniutama Management Holdings Sdn Bhd v. Mata IT Services Sdn Bhd* [2009] 1 LNS 1583.

Applying The Principles To The Facts Of These Appeals

[9] The first question I need to ask is was the reasoning to appoint a new solicitors sufficient to refuse adjournment? Second, was this a case of one adjournment after another? Third, was the rights of the appellants affected by the decision of the trial judge? I find the trial judge did not address her mind that the appellants were given four days only to appoint a new solicitors. I was of the view that four days is insufficient to enable the appellants to appoint a new solicitors for reason the previous solicitor refused to allow the new solicitor to take over conduct of the matters. Here, the appellants had clearly indicated and had unreservedly appointed Mr Raj of Messrs Raj & Co. So it is not a case of the appellants still looking for a solicitor. The notice of change of

A solicitor could not be filed due to the non consent of the previous solicitor. In that sense, the appellants cannot be blamed if the new solicitor cannot take over the case. Their inability to effect the change of solicitor is a genuine predicament and constitute sufficient grounds to grant adjournment.

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[10] On the number of adjournment, I find this is not a case of one adjournment after another. First adjournment was granted on 5 November 2009. 9 November 2009 is the 2nd adjournment. If the trial judge really wanted to proceed with the case, she can C give an ultimatum to the appellants to sort out the problem of appointing a new solicitor before the case continued hearing on 24 November 2009. That would give sufficient time to the appellants and the new solicitor to do the needful to proceed with the case. After all this is a year 2008 case and not an old case of D year 2000.

[11] Another crucial point the learned trial judge seemed to have overlook is the merit of the appellants case. This is a negligence suit where liability and damages had to be determined and E assessed by the court. From the pleadings, the court is not able to say whether the appellants had no meritable case. It is not correct for the trial judge to say the appellants had failed to prove their claim when she refused to give a chance to the appellants to prove their claim. The appellants' position fit the description in F *Maxwell v. Keun* in that the dismissal of the claim had resulted in the appellants rights being destroyed. I was of the opinion there was a grave injustice occasioned as a result of the dismissal of the claim without hearing the merit of the case. In *Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor* [2001] 4 G CLJ 1, the Court of Appeal dismiss an appeal without hearing merits of the case on the ground of the appellant's delay in filing supplementary record of appeal. In his dissenting judgment, His Lordship Abdul Hamid JCA made this observation which I think is very pertinent to the appeal before me.

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> ... the main function of the court is to do justice not just to dispose of cases. At times it is unjust to dismiss an appeal without even hearing the arguments on merits purely on the ground that due to the mistake of a solicitor, something that should have been done is not done.

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[12] Considering the merits of the case was not heard, I was of the view that grave injustice had been caused to the appellants in these appeals with the refusal of an adjournment, denying them the right to be represented by counsel of their own choice and of utmost important the right to be heard. Litigants come to court because they believed they would not be denied the right to prove their claim. After all court exist to determine the rights and liabilities of the parties. For the aforesaid reasons, I allowed all the three appeals with no order as to costs. The cases will be reverted back to the Sessions Court for continued hearing.